

MINUTES OF MEETING OF THE CORPORATIONS COMMITTEE

February 7, 2003

A regular meeting of the Corporations Committee (the "Committee") of the Business Law Section of the State Bar of California was held at the Los Angeles Airport Marriott Hotel on February 7, 2003. Attendance was as follows:

MEMEBERS PRESENT:

Curt C. Barwick
Keith Paul Bishop
John C. Carpenter
Bruce Dravis
James K. Dyer, Jr.
Timothy J. Fitzpatrick
James F. Fotenos
Steven K. Hazen
Mark T. Hiraide
Victor Hsu
John H. Marlow
Keith B. Martin
Stewart Laughlin McDowell
Cynthia Ribas
Randall Brent Schai
James R. Walther
Nancy Wojtas
Brian Wong

MEMBERS ABSENT:

Nelson D. Crandall
Teri Shugart Erickson
Brian D. McAllister
Ethna M. S. Piazza
David M. Pike
Daniel J. Weiser
Neil J Wertlieb

LIAISONS PRESENT:

R. Bradbury Clark, Nonprofit and Unincorporated Organizations Committee
Christine Connolly, NASD
William Gay, Business Law Section Executive Committee
Gayle Oshima, Department of Corporations

The minutes summarize discussions primarily in the order items were listed on the Agenda for the meeting previously circulated to members of the Committee, which is not necessarily the order in which the items were actually taken up at the meeting. The Committee did not take up those topics listed on the Agenda, which are not described in these minutes.

I. ADMINISTRATIVE MATTERS.

A. Opening Remarks and Announcements. The meeting was called to order by Co-Chair Bruce Dravis at approximately 9:30 a.m. Mr. Dravis reported that on

January 29, 2003, the Securities and Exchange Commission (“SEC”) adopted final rules under Section 307 of the Sarbanes-Oxley Act of 2002 (“Sarbanes-Oxley Act”) pertaining to the implementation of standards of professional conduct for attorneys appearing before the SEC. Mr. Dravis noted that the Committee’s comment letter was cited numerous times by the SEC in its final release and that many of the provisions in the proposed rules that were opposed by the Committee were not included in the final rules. However, the SEC has extended the comment period with respect to the “noisy withdrawal” provisions of the proposed rules and has proposed a potential alternative for consideration.

B. Minutes of January 3, 2003 Meeting. Mr. Dyer reported that a few minor clerical comments to the draft minutes of the meeting of the Committee held on January 3, 2003 were received by him prior to the meeting. The minutes of the January 3, 2003 meeting previously circulated to the members, with minor revisions to address the comments received by Mr. Dyer prior to the meeting, were approved by the Committee.

II. LIAISONS’ REPORTS AND DISCUSSION.

A. Securities and Exchange Commission. The Committee had an extensive discussion concerning the recent activities of the SEC, including the recently adopted final rules under Section 307 of the Sarbanes-Oxley Act, which are discussed in greater detail elsewhere in these minutes.

B. Department of Corporations. Gail Oshima provided an update on current events at the Department of Corporations (“Department”). Ms. Oshima reminded the Committee that 25102(f) notices are now available on the Department’s website through its Cal-EASI database. Ms. Oshima noted that the Department is considering posting other filings on the website, including securities permit applications and franchise applications. Ms. Oshima informed the Committee that the Department’s press release in connection with its notice of intent to revoke the residential mortgage license of Wells Fargo Home Mortgage is posted on the Department’s website. In addition, Ms. Oshima discussed the amendments to the church debt offering rules recently proposed by the Department.

C. BLS Executive Committee. Bill Gay provided the liaison report for the Executive Committee. Mr. Gay reported that the Executive Committee was very interested in completing the *Blue Sky Guide* (“Guide”) and thought it would be useful in connection with the Business Law Section’s membership drive. Co-Chair Keith Bishop noted that the Guide was scheduled for publication in the very near future.

D. NASD. Christine Connolly provided a brief overview of current events at NASD.

E. Partnerships and LLC Committee and FASB Reporter. Steve Hazen reported on recent events concerning the Partnerships and LLC Committee. Mr. Hazen noted that the Partnerships and LLC Committee plans to have a legislative proposal regarding the adoption of the Re-Revised Uniform Limited Partnership Act

("RERULPA"). In addition, the Partnerships and LLC Committee is working on two legislative proposals relating to California limited liability companies; one relating to the consequences of the death of a single member, and the other relating to nonprofits as single members of a California limited liability company. Mr. Hazen also reported on the recent activities of the Financial Accounting Standards Board ("FASB") relative to special purpose entities. An extensive discussion followed concerning the related pronouncements recently adopted by FASB, including FASB Interpretation 46, Consolidation of Variable Interest Entities.

F. Corporate Law Department Committee. Curt Barwick reported that he had been in contact with the Chair and certain other officers of the Corporate Law Department Committee and provided a brief summary of that committee's recent activities. Mr. Barwick informed the Committee that the Corporate Law Department Committee would be interested in working on joint projects with the Committee. The Committee discussed the possibility of holding a joint meeting with the Corporate Law Department Committee.

G. UCC Committee. Jim Fotenos reported that the UCC Committee has completed its report on the potential revisions to Articles 3 and 4 formulated by the National Conference of Commissioners for Uniform State Laws ("NCCUSL") and the American Law Institute ("ALI") and has forwarded its report to the Executive Committee for approval.

H. Nonprofit and Unincorporated Organizations Committee. Brad Clark reported that significant efforts of the Nonprofit and Unincorporated Organizations Committee relate to the law of unincorporated associations. Mr. Clark also informed the Committee that the Nonprofit and Unincorporated Organizations Committee would like to participate with the Committee on any projects that could impact nonprofits, such as legislative proposals.

III. PENDING LEGISLATION/AFFIRMATIVE LEGISLATIVE PROPOSALS.

A. Report by Legislative Liaison. Jim Fotenos reported on the current status of pending legislation. Mr. Fotenos reminded the Committee that the deadline for the introduction of bills is February 21st. Mr. Fotenos reported on the following bills: (i) AB 169 (Chavez), the Committee's legislative proposal relating to finance lenders, (ii) AB 88 (Corbett and Steinberg), relating to telephone solicitations, (iii) AB 95 (Corbett), relating to unfair competition claims, (vi) AB 102 (Pacheco), pertaining to representative civil actions under the unfair competition laws, and (v) AB 123 (Cohn and Chavez), regarding the expansion of the list of persons (to include licensed dentists) who may be shareholders, officers, directors and professional employees of a professional corporation.

B. Secretary of State Fax Filings. Bruce Dravis reported that Senator Romero is carrying the Committee's legislative proposal concerning fax filings and that the Los Angeles County Bar Association is co-sponsoring this proposal.

C. Finance Lenders Law (AB 169). Keith Bishop provided an update on the status of the Committee's legislative proposal regarding the finance lenders law. The bill was introduced by Assembly Member Chavez and has been referred to the Senate Banking Committee. The Department of Corporations has raised certain issues concerning the proposed legislation as set forth in its letter to Larry Doyle, Chief Legislative Counsel, State Bar of California, dated December 10, 2002, which was included with the materials distributed to the members of the Committee prior to the meeting. Various strategic options were considered by the Committee.

IV. POTENTIAL AFFIRMATIVE LEGISLATIVE PROPOSALS

A. 25118(b) Definition of Aggregate Evidences of Indebtedness. In Dan Weiser's absence, it was reported that a revised legislative proposal would be circulated to the members of the Committee to be discussed at the next meeting.

B. Electronic Communications Under the Corporations Code. Randy Schai provided an overview of the revised legislative proposal concerning electronic communications under the Corporations Code that was distributed to the members of the Committee prior to the meeting. From a technological perspective, Mr. Schai reported that the objective of the drafters was not only to recognize existing technologies but to also accommodate evolving technological advances. An extensive discussion followed, and the drafters were commended by the Committee for their significant efforts. Brad Clark indicated that the Nonprofit and Unincorporated Organizations Committee would like to have input on the legislative proposal with respect to analogous provisions of the nonprofits law.

V. WEBSITE PROJECTS

Keith Bishop reported that the Committee's website is current, and complimented Victor Hsu and John Marlow on their efforts to maintain the current events page. Members of the Business Law Section are receiving periodic notices of updates posted to our website.

VI. OTHER PROJECTS

A. Opinion Project. In Nelson Crandall's absence, Co-Chair Dravis delivered a brief status report of the opinions project. A discussion of the scope of the Committee's project in light of the activities of the Legal Opinions Committee followed.

B. Educational Activities. Co-Chair Bishop reported that David Pike provided him with an update on educational activities prior to the meeting. The State Bar Section Education Institute was held on January 17 through 19 at the Claremont Resort in Berkeley. The Committee presented two programs: Should you bet on a Nevada corporation? and Drafting a bulletproof covenant not to compete. The Committee has the following three programs scheduled for the BLS Spring Meeting in April (April 4-6) at the Park Hyatt Century City: (i) The SEC's attorney conduct rules under the Sarbanes-

Oxley Act (Fotinos, Hoxie, Small); (ii) Recent developments in corporate governance for the California lawyer (Caplan, Hazen, McDowell); and (iii) Foreign corporations doing business in California: the impact of California's pseudo foreign corporation statute and California's new corporate disclosure law (Walther, McAllister). The Committee has submitted three proposed program topics for the State Bar Annual Meeting (September 4-7) in Anaheim. The topics are conflicts of interest and engagement letters, covenants not to compete, and recent developments in California law. Each of these programs is tentatively scheduled for two hours. However, the Business Law Section will prioritize programs and may delete or shorten them to fit the schedule. The final program selections and tentative schedule should be available by the end of February. Nancy Wojtas has volunteered to work on the Corporations Committee portion of the annual update.

C. Guide to Organizing a California Corporation. Mark Hiraide reported that the drafting subcommittee is working to meet the summer deadline for completion of the *Guide to Organizing a California Corporation*.

D. Blue Sky Guide. Keith Bishop reported that the *Blue Sky Guide* is scheduled for completion this month.

E. Comment Letter on SEC Attorney Regulations. The Committee had a lengthy discussion concerning the final rules recently adopted by the SEC under Section 307 of the Sarbanes-Oxley Act and the impact of the Committee's comment letter to the SEC on this issue. Many of the provisions in the proposed rules to which the comment letter objected were not included in the final rules. For instance, the proposal on noisy withdrawal was not adopted (subject to further consideration), the definition of "issuer as an organization" was more narrowly defined, the mandatory disaffirmance requirements were not adopted, the record keeping requirements were withdrawn, and the SEC proposal stating that the sharing of information with the SEC would not constitute a waiver of the attorney-client or any other applicable privilege was withdrawn. In addition, the definition of "appearing before the commission" was more narrowly defined in the final rules.

VII. NEW BUSINESS

A. Nevada Law Issues Affecting California Lawyers. Keith Bishop informed the Committee about the recently adopted annual reporting requirement of Nevada for attorneys engaged in extra-judicial matters in Nevada. The related form was included in the materials distributed to the Committee members prior to the meeting. An extensive discussion followed.

B. Potential New SEC Comments – Section 16 Filings. Keith Bishop provided an overview of a release and proposal of the SEC in connection with Section 403 of the Sarbanes-Oxley Act, and a draft of a comment letter from the Committee in connection with the SEC release that was previously distributed to the members of the Committee. The submission of the Committee's comment letter to the SEC, in

substantially the form distributed to the members of the Committee prior to the meeting, was unanimously approved by the Committee.

C. Potential New SEC Comments – Noisy Withdrawal. Although the SEC has adopted final rules under Section 307 of the Sarbanes-Oxley Act, it has extended the comment period with respect to the noisy withdrawal provisions of the proposed rules and has proposed an alternative approach. Steve Hazen informed the group that the comment period ends on April 7, 2003. Mr. Hazen also noted that the alternative approach of issuer disclosure of attorney withdrawal was previously considered and rejected by the drafting committee of the Committee's previous comment letter. An extensive discussion relating to the SEC proposal followed. Significant concern was expressed concerning the negative impact that either proposal would have on the willingness of companies to seek counsel and with respect to the fundamental changes to the attorney-client relationship that would result. The impact of disclosure on the attorney-client privilege in California under both proposals was also discussed. The Committee agreed that it would submit a comment letter to the SEC regarding this matter and appointed Keith Bishop, Bruce Dravis, Jim Fotenos, Steve Hazen, Randy Schai and Nancy Wojtas to prepare a draft of the comment letter for consideration at the next meeting of the Committee.

D. Committee Matrix. Jim Dyer reminded the Committee that certain background information regarding each member is required by the California State Bar. Mr. Dyer will follow up with those who have not responded to his previous request for such information.

E. Practice Issues. The Committee considered a few practical issues affecting corporate lawyers in California. Certain issues concerning reporting under AB 55 were reported. In addition, the law of privacy in California was discussed. Also, in light of the significant recent FASB pronouncements, the Committee discussed the importance of the definition of generally accepted accounting principles in agreements.

The meeting was adjourned at approximately 12:30 p.m.

James K. Dyer, Jr.